

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**INCOME TAX REFERENCE No. 105 of 1996****For Approval and Signature:****HONOURABLE MR.JUSTICE R.S.GARG****HONOURABLE MR.JUSTICE D.H.WAGHELA**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?

4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?

5 Whether it is to be circulated to the civil judge
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COMMISSIONER OF INCOME TAX - Applicant(s)**Versus****LOK PRAKASHAN LTD. - Respondent(s)**

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Appearance :

MR MANISH R BHATT for Applicant

None for Opponent

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG**and****HONOURABLE MR.JUSTICE D.H.WAGHELA****Date : 16/11/2006****CAV JUDGMENT****(Per : HONOURABLE MR.JUSTICE R.S.GARG)**

1. The Income Tax Appellate Tribunal, Ahmedabad Bench "A" has made this Reference on an application by the Revenue under Section-256[1] of the Income Tax Act for opinion of this Court on the following question arising out of Income Tax Appeals No. 1965, 1966, 1967 and 1968/Ahd/1987 pertaining to Assessment Years 1973-74, 1974-75, 1975-76 and 1976-77.

"Whether, the Appellate Tribunal is right in law and on facts in holding that the notice issued under Section 147 read with Section 148 was invalid, in as much as the requirements of Section 149[1][a][ii] of the Act were not complied with?"

2. Short facts necessary for proper appreciation of the dispute are that, the assessee company, claiming itself to be an industrial company engaged in the business of publishing newspapers and magazines, had been claiming all through that it was a company in which public were substantially interested and on such statement

of the company, it had been assessed as such by the department for many years.

3. During course of the assessment proceedings for the Assessment Year 1982-83, the Assessing Officer found that more than 50% of the shares of the assessee company were held by the family of Shri Shantilal A. Shah and his two sons and control over the affairs of the company was with less than five persons of that family. The Assessing Officer recorded statement of one Ratilal Khushaldas, one of the directors of the assessee company, who stated that the company was managed by Shantilal A. Shah, his daughter-in-law Smt. Smrutiben and his son, Babulal Shah. After the facts started floating on the surface of the record, Shri Shantilal A. Shah, by his application/letter dated 30.5.1985, stated that he had control over the management of the assessee company. Vide his letter dated 13.8.1985, he prayed that the matter be referred to the Settlement Commission. Vide letter dated 17.10.1985, Shri Shantilal A. Shah admitted

before the Assessing Officer that the company was closely held company and it be so treated for the Assessment Year 1982-83.

4. The Income Tax Officer, on the above basis, formed an opinion and recorded reasons to believe that the assessee had omitted/failed to furnish the details relevant for Section 2[18] of the Act and the same had resulted into assessment of the company at lower rate of tax for the Assessment Years 1969-70 to 1981-82. He accordingly issued notices under Section 147[a] read with Section 148 of the Income Tax Act, 1961 for reopening of the assessment relating to Assessment Years 1969-70 to 1976-77 after obtaining due approval from the Central Board of Direct Taxes. The notice was served upon the assessee on 25.2.86. For Assessment Years 1977-78 to 1980-81, the Income Tax Officer obtained necessary approval from the Commissioner of Income tax, Gujarat-I Ahmedabad and issued notices on 27.1.86, which was served on 31.1.86. The assessee filed on 30.3.1986 returns of

income in response to the notice under Section 149 for all the Assessment Years from 1969-70 to 1980-81.

5. During the reassessment proceedings, the Assessing Officer found that the assessee company had shown its status as closely held company for Assessment Years 1969-70 to 1981-82. He accordingly passed a common order for all the Assessment Years observing that the total income earlier assessed would not change, but the assessee is required to be taxed at a higher rate. Being aggrieved by the said orders, the assessee preferred appeals before the Commissioner of Income Tax [Appeals]. Learned C.I.T.[Appeals], after considering all the submissions made before him, held that primary condition laid down under Section 149[1][a][ii] of the Act was not satisfied as in none of the assessments for Assessment Years 1969-70 to 1976-77, change in income was more than Rs. 50,000/-. He accordingly held that the notice issued under Section 148 of the Act was invalid.

He also held that the admissions of the assessee were not appreciated in their true perspective, and, accordingly, allowed all the appeals.

6. Against the above orders dated 27.3.87 of the the CIT [Appeals], the Revenue filed only four appeals for the Assessment Years 1973-74 to 1976-77. The Tribunal, after hearing the parties, vide its order dated 29.5.95, observed that the cumulative effect and juxtaposed reading of the provisions of law would be that, escapement of income chargeable to tax must be Rs. 50,000/- or more as it would be a condition precedent for application of Section 149[1][a][ii] and as the original income assessed earlier did not change, the Assessing Officer had no jurisdiction to proceed with reassessment.

7. The Revenue, being aggrieved by the said order passed by the Tribunal, made an application for Reference of the questions proposed by it and as the application was allowed, the question for our opinion is before us.

8. We have heard Shri M.R. Bhatt, learned counsel for the Revenue. None appears for the opponent though served.

9. Mr. Bhatt, learned counsel for the Revenue submitted that the learned Tribunal did not properly appreciate the provisions contained in Sections 147, 148 and 149 of the Income Tax Act. He submitted that Explanation-1 of Section 147 which clarifies Clauses[a] and [b] of Section 147, if appreciated in its true perspective, would make it clear that availability of any of the premises contained in Clauses-[a] to [d] of Explanation-1 would also, by deeming fiction, be the cases where income chargeable to tax has escaped assessment. Placing reliance upon Clause-[b] of Explanation-1, he submitted that, where such income had been assessed at too low a rate, it would be deemed that income had escaped assessment. His submission was that there might be different types of escapement of assessment and under such circumstances, it could not be

held that as there was no change in the returned income, notice could not be issued. His further submission was that the whole of the income which was earlier assessed had to be taken to be the income assessed at too low a rate and if that very income was more than Rs. 50,000/-, then, the limitation would be 16 years.

10. Before we proceed to consider the provisions contained in Sections 147, 148 and 149 of the Act of 1961, we would prefer to refer to Section 34 of the Indian Income Tax Act, 1922. Clause-[1] of Section 34 provided that if the Income-tax Officer had reason to believe that by reason of the omission or failure on the part of the assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income-tax had escaped assessment for that year, or had been under-assessed, or assessed at too low a rate, or had been made the subject of excessive relief under

the Act, or excessive loss or depreciation allowance had been computed, he may in cases falling under clause-[a] at any time and in cases falling under clause-[b] at any time within four years of the end of that year, serve upon the assessee, etc., a notice under sub-section [2] of Section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of that Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section. Limitation clause under Section 34 of that Act provided that;

“Provided that the Income-tax Officer shall not issue a notice under clause [a] of sub-section [1]__

[i] for any year prior to the year ending on the 31st day of March, 1941;

[ii] for any year, if eight years have elapsed after the expiry of that year, unless the income, profits or gains

chargeable to income-tax which have escaped assessment or have been under-assessed or assessed at too low a rate or have been made the subject of excessive relief under this Act, or the loss or depreciation allowance which has been computed in excess, amount to, or are likely to amount to, one lakh of rupees or more in the aggregate, either for that year, or for that year and any other year or years after which or after each of which eight years have elapsed, not being a year or years ending before the 31st day of March, 1941;

[iii] for any year, unless he has recorded his reasons for doing so, and, in any case falling under clause [ii], unless the Central Board of Revenue, and, in any other case, the Commissioner, is satisfied on such reasons recorded that it is a fit case for the issue of such notice."

11. From a perusal of Section 34, it would clearly appear that period of 8 years was fixed as

extended period of limitation. A comparative study of Section 34 of the old Act with Sections 147, 148 and 149 of the 1961 Act shall make it clear that the provisions are almost identical. They give authority to the Income Tax Officer who has reason to believe that some income has escaped assessment or where such income has been assessed at too low a rate or where such income has been made subject of excessive relief under the 1961 Act or 1922 Act or where excessive loss or depreciation allowance has been computed. It would also appear from a comparison that period of limitation is fixed and beyond the said period, notice cannot be issued by the Income Tax Officer.

12. The question before us is whether in cases where Clause-[b] of Explanation-1 of Section 147 applies, the whole of the income assessed at too low a rate has to exceed Rs. 50,000/- or whether the income which has escaped assessment has to be likely to exceed Rs. 50,000/-, for the purpose of limitation under Section 149 of the

Act or it would be sufficient for the revenue to show that the income earlier assessed at too low a rate was above Rs.50,000/-.

13.A perusal of the facts of the case would show that the assessee was assessed as a company as defined under Section 2[18] of the Act of 1961 and not as closely held company. Mr. Bhatt submitted that in case of a closely held company, rate of tax was 60% and surcharge was to be added at 5%, while for a company under Section 2[18], rate of tax was much less than 60% and surcharge was relatable to the tax.

14.In a given case, where a company is assessed as a company defined under Section 2[18], which means a company where public is substantially interested, then, the tax would be at a lower rate and if the company is taken to be closely held company, then, rate of tax would be much higher. Once the fact that change of status of the assessee from a company under Section 2[18] to a closely held company was undisputed, it

will have to be held that the returned income had been assessed at too low a rate. If the liability of the company was to pay tax at the higher rate and it had been charged tax at a lesser rate, the case of such assessee would fall under Clause-[b] of Explanation-1.

15. According to the relevant part of the Scheme for assessing escaped income, as contained in Sections 147 to 153 of the Act, the Income Tax Officer is empowered to assess or reassess the income of an assessment year if he has reason to believe that income chargeable to tax has escaped assessment. The phrase "income chargeable to tax has escaped assessment" is given an extended meaning by incorporating deeming clause in Explanation-1 of Section 147. Sub-clause [b] of the Explanation makes it obligatory to deem escapement where income chargeable to tax has been assessed but assessed at too low a rate. Section 148 provides for recording of reason and service of notice as conditions precedent to making assessment or

reassessment of the income which is deemed to have escaped assessment. And Section 149 prescribes further limitation in terms of years and the amount of the income which has escaped assessment. No notice under Section 148 can be issued unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more in the relevant year. A conjoint reading of the above provisions would clearly indicate that the amount of income which was chargeable to tax but which had escaped assessment has to be or likely to be Rs.50,000/- or more for application of Section 149[1][ii]. However, in cases where income has been assessed but at too low a rate, it has to be deemed to have escaped assessment and, therefore, the income which has been assessed but assessed at too low a rate must be Rs. 50,000/- or more for the purpose of application of Section 149. Accordingly, the whole amount of income which has been assessed at too low a rate has to be rupees fifty thousand or more and the question of calculating

the amount which has or likely to have escaped assessment does not arise. In other words, if the amount of income which has been assessed at too low a rate is rupees fifty thousand or more, the requirement of Section 149[1][a][ii] would stand satisfied and notice under Section 148 could be issued after recording reasons, if it is also within the prescribed period of limitation. In our opinion, for attracting Sections 147 and 149[1][a][ii], the very income which has already been assessed at too low a rate must be Rs.50,000/- or more.

16. In **Re Chotay Lal [A.I.R. 1932 Allahabad 83]**, a Division Bench of Allahabad High Court has observed that where assessment of super tax was completed as if assessee were Hindu undivided family and the first Rs.25,000/- of his income above the first Rs.50,000/- not charged with any super tax, subsequently, it was found that the assessee was an individual, it must be held that the sum of Rs.25,000/- had been assessed at too low a rate within Section 34 and is liable

to assess to super tax. In the said case, assessment of super tax had been completed under Section 23[4] as if the assessee were a Hindu undivided family and consequently, the first Rs.25,000/- of the income above the first Rs.50,000/- were not charged with any super tax, but it was subsequently held that the assessee was an individual, though no portion of the income of the assessee had escaped assessment within the meaning of Section 34, still a sum of Rs.25,000/- has been assessed at too low a rate within the meaning of Section 34 and in such case, the Income Tax Officer could proceed under Section 34.

From this judgment, it would clearly appear that when status of an assessee changes and it with the change in the status he is liable to be taxed at a higher rate, then, whole of the income which was earlier charged at a low rate would be available for the purposes of reassessment.

17. In **Re Lakshmi Narain Gadodia & Co.** [[1943] 11

ITR 491], Division Bench of Lahore High Court held that Section 34 gives power to the Income-tax authorities to take action, where, *inter alia*, the assessee "has been assessed at too low a rate or has been the subject of an excessive relief under the Act" and, therefore, under the circumstances of the case the Income-tax Officer was empowered to use Section 34.

18. In the matter of **Sundaram and Co.[Private] Ltd.**

V. Commissioner of Income-tax, Madras [[1967] 66 **ITR 604]**, the Apex Court observed that:

"The word "rate" in the expression "too low a rate" in section 34[1][b] of the Indian Income-tax Act, 1922, does not mean a fraction of the total income. By the use of the word "rate" in the context in which it occurs, undoubtedly a relation between the taxable income and the tax charged is intended. But the relation need not be of the nature of proportion or fraction. The word "rate" is often used in the sense of a standard or measure. Provided, the tax is

computable by the application of a prescribed standard or measure, though not directly related to taxable income, it may be called tax computed at a certain rate. The rebate of tax and the reduction of such rebate are essentially matters of measure or standards of rate. The chief aim and object of the Finance Act, 1956, is to prescribe the standard or measure of income-tax and super-tax and an assessee escaping some of its provisions and failing to pay the full measure of tax is assessed at too low a rate."

The Apex Court held that as in the assessment of the company the Income-tax Officer had granted full rebate from super-tax under the second proviso to Paragraph D of Part II of the First Schedule to the Finance Act, 1956, and had failed to reduce the rebate on the basis of the amounts distributed by it as dividends in excess of 6 per cent of its paid up capital, the company could be said to be assessed at too low a rate within the meaning of section 34[1][b].

From the dictum of the Apex Court it would clearly appear that where such rebate from super tax had been granted and the Assessing Officer failed to reduce the rebate on the basis of the amounts deducted by him as dividend in excess of 6% of its paid up capital, the Company could be said to have been assessed at too low a rate within the meaning of Section 34[1][b].

19. In the present matter also, the assessee had been earlier assessed as a company falling under Section 2[18] of the 1961 Act, but once the Assessing Officer finds and the fact is not disputed by the other side that it is closely held company and higher tax would be chargeable, then, present would be a case falling under Clause-[b] of Explanation-1 of Section 147 and the Court would be justified in holding that whole of the income which was earlier assessed would be available for higher charge of tax.

20. It is to be noted that for Assessment Years 1973-74, 1974-75, 1975-76 and 1976-77, sum of

Rs.1320830/- ,Rs.1081410/- ,Rs.16552230/- and Rs.688940/- were shown as the income. In view of the above discussion, we must hold that in each of the year, income was more than Rs.50,000/- and in each of the year, income was assessed at too low a rate.

21. In **P.L.M.P.L. Palaniappa Chettiar v. Commr. Of Income-tax, Madras [A.I.R. 1930 Madras 126]**, Full Bench of the Madras High Court has observed that in a case where rate is sought to be raised under Section 34 of the Act, an Income-tax Officer is not bound to determine afresh the correct taxable income of the assessee. Accordingly, we hold that the income already assessed to tax would be taken to be the income for purposes of Section 147 and if income is more than Rs.50,000/-, then, it has to be held that for each of the year, the amount which was assessed at too low a rate was above Rs. 50,000/- .

22. Considering the totality of the circumstances

and the facts floating on the surface of the records, we hold that the Tribunal was not right in law and on facts in holding that the notice issued under Section 147 read with Section 148 was invalid inasmuch as requirements of Section 149[1][a][ii] of the Act were not complied with. Accordingly, the question is answered in favour of the Revenue.

[R.S. GARG, J.]

[D.H. WAGHELA, J.]

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